Supreme Court, U. S.
FILED
MAY 22 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1428

THE FORD MOTOR COMPANY,
Petitioner,

vs.

THOMAS POLK,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION

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TO: The Honorable, The Chief Justice and The Associate Justices of the Supreme Court of the United States

I.

No Federal Court Has Considered or Addressed the Question of Whether a District Court Sitting in a Diversity Action Is Required by Erie Railroad Company v. Tompkins, 304 U.S. 64 (1938) to Apply the Law of the Forum State Establishing the Size of Juries in Civil Cases Where a State's Constitution Specifically Requires That Civil Trials Be to a Twelve-Person Jury.

Respondent incorrectly asserts that the question presented by Petitioner's application for Writ of Certiorari has been previously decided adversely to Petitioner by four

Circuit Courts of Appeal. No Federal Court has ruled on the question whether a U.S. District Court is required by *Erie Railroad Company* v. *Tompkins, supra,* to empanel a twelve-person jury in civil cases, in contradiction to a local District Court rule, when the state's constitution and its Supreme Court decisions require a twelve-person jury as a matter of substantive right.

The Eighth Circuit, in the instant case, is the only Circuit Court of Appeals to hold that the right to trial before a twelve-person jury when mandated by state constitution and state Supreme Court decisions is procedural rather than substantive. The Ninth Circuit Court of Appeals in *Dashiell* v. *Keauhou-Kona Company,* 487 F.2d 957 (9th Cir. 1973) merely held that an opinion of that state's attorney general as to jury size was not a sufficient expression of state law to warrant the invocation of the doctrine of *Erie Railroad Company* v. *Tompkins, supra.* The First Circuit Court of Appeals ruled similarly in *Wilson* v. *Nooter Corporation,* 475 F.2d 497 (1st Cir., 1973), denied 414 U.S. 865 (1973). The application of the doctrine of *Erie Railroad Company* v. *Tompkins, supra,* was not warranted in that case solely because the Court did not believe there was a sufficiently recent expression of New Hampshire law on the issue. The latest opinion of the Supreme Court of New Hampshire requiring a twelve-person jury in civil cases was issued in 1875. The judges of the First Circuit therefore assumed they had the right to reject state law and speculated that the Supreme Court of New Hampshire would reverse itself were it then presented with the identical question.

Neither *Dashiell* v. *Keauhou-Kona Company, supra,* nor *Wilson* v. *Nooter Corporation, supra,* has any application to the instant case. The requirements of the Missouri constitution are not dependent on an interpretation by the Missouri attorney general. Rather there is a clear and distinct

mandate which requires a twelve-person jury in civil cases. Article I, Section 22(a) Constitution of the State of Missouri provides:

> "That the right of trial by jury as heretofore enjoyed shall remain inviolate; provided that a jury for the trial of criminal and civil cases in courts not of record may consist of less than 12 citizens as may be prescribed by law, and a two-thirds majority of such number concurring may render a verdict in all civil cases; that in all civil cases in courts of record, three-fourths of the members of the jury concurring may render a verdict; and that in every criminal case any defendant may, with the assent of the court, waive a jury trial and submit the trial of such case to the court, whose finding shall have the force and effect of a verdict of a jury."

There is no doubt as to the meaning and requirement of Article I, Section 22(a) Constitution of the State of Missouri.

The substantive state right of the citizens of Missouri to have civil cases tried before a twelve-person jury is not of ancient or questionable heritage. In addition to the provisions of the Constitution of the State of Missouri, the Supreme Court of Missouri has consistently held for the last 116 years, and as recently as 1972, that a citizen's right to trial before a twelve-person jury is the substantive right which cannot be denied. *Vaughn* v. *Scade,* 30 Mo. 600 (1860); *Rodenhauser* v. *Lashly,* 481 S.W.2d 231 (S.Ct.Mo. 1972); *Beggs* v. *Universal C.I.T. Credit Corp.,* 387 S.W.2d 499 (S.Ct.Mo. en banc 1965).

Respondent also relies on *Palmer* v. *Ford Motor Company,* 498 F.2d 952 (10th Cir., 1974) as supporting the proposition that right to trial before a twelve-person jury is merely procedural. *Palmer* v. *Ford Motor Company, supra,*

does not support the proposition urged. Rather, the Court of Appeals for the Tenth Circuit merely held that the Kansas statute allowing deviation from a twelve-person jury was procedural. However, the Court acknowledged that under proper circumstances, such as the constitutional provision specifying jury size, their holding could well be different. For unlike the Missouri Supreme Court, which has held that the size of a jury is substantive and "bound up" with the rights and obligations of the cause of action, the Kansas Supreme Court has ruled to the contrary. *Bourne* v. *Atchison, Topeka & Santa Fe Railway Company,* 209 Kan. 511, 497 P.2d 110 (1972). This is clearly contrary to the rulings of the Missouri Supreme Court. The Tenth Circuit Court of Appeals would have reached a different result on different facts for it correctly recognized that *Colgrove* v. *Battin,* 413 U.S. 149 (1973), is not dispositive of the issue presented.

The authorities relied upon by Respondent in seeking to restrict the doctrine of *Erie Railroad Company* v. *Tompkins, supra,* do not support Respondent's position. There is an unmistakably clear statement of the law of Missouri which requires the invocation of the doctrine of *Erie Railroad Company* v. *Tompkins, supra.*

The law of Missouri is not vague and, therefore, subject to indiscriminate interpretation by the judges of the Eighth Circuit Court of Appeals. Federal Courts are bound to follow the law of the forum in diversity cases. *Yoder* v. *Nu-Enamel Corporation,* 117 F.2d 488 (8th Cir., 1941); *Ross* v. *Philip Morris & Co., Ltd.,* 328 F.2d 3 (8th Cir., 1964); and *Elliott* v. *Alpac Corporation,* 396 F.2d 438 (9th Cir., 1968).

This mandate cannot be disregarded by the District Court for the Western District of Missouri or the United States Court of Appeals for the Eighth Circuit.

II.

The Federal Courts Have Never Ruled the Question of Whether a Federal District Court Sitting in a Diversity Case Is Required by Virtue of the Doctrine of Erie Railroad Company v. Tompkins, 304 U.S. 64 (1938) to Empanel a Twelve-Person Jury As Required by State Constitution and in Contradiction to a Local Rule of the Federal District Court.

Respondent argues that state practice pertaining to jury size in civil cases has long been subjugated to federal control; *Simler* v. *Conner,* 372 U.S. 221 (1963) and *Byrd* v. *Blue Ridge Electric Cooperative,* 356 U.S. 525 (1958). Neither *Simler* v. *Conner, supra,* nor *Byrd* v. *Blue Ridge Electric Cooperative, supra,* are applicable to the instant case.

Simler v. *Conner, supra,* dealt solely with the issue of whether the right to trial by jury guaranteed by the Seventh Amendment to the United States Constitution was to apply in diversity cases. This Court's decision merely required uniformity in application of the Seventh Amendment right to jury trial. The existence of the right to jury trial was in issue and not the extent of the exercise of that right. Clearly, there was no issue as to jury size.

Byrd v. *Blue Ridge Electric Cooperative, supra,* is likewise inapplicable to the instant case. The question therein was whether a decision by the Supreme Court of South Carolina requiring a determination of an employer's statutory immunity under the South Carolina Workmen's Compensation statute by the Court rather than a jury should be given effect in Federal Courts. There was no reason for the South Carolina policy requiring immunity questions to be decided exclusively by the Court. The South Carolina policy was merely a mode for enforcing the immunity and

not a part of the cause of action intended to be bound up with the rights and obligations of the parties. In exempting the District Court from the state law, this Court in *Byrd* found that the essential character of the Federal Court and the District Judge would be altered if state law was given effect. *Byrd* was not intended to have the reach Respondent urges for there was a specific recognition that the right to trial by jury is a substantial part of any cause of action. No question of altering the function of the Federal Court is involved in the instant case. Therefore, *Byrd* v. *Blue Ridge Electric Cooperative, supra,* has no application.

There is no valid reason for denying application of the *Erie* doctrine. Uniformity of the federal system is not involved. There is no question involving the existence of a right to jury trial. Rather the question is the extent to which the citizens of the several states may enjoy the exercise of that right. The citizens of Missouri and the Missouri Supreme Court have determined that as a matter of substantive right the full exercise of the right to trial by jury requires trial before a twelve-person jury. The Federal Courts have no basis for denying this right under the claim that it is procedural in nature. The invocation of the *Erie* doctrine and thereby the application of the Constitution of Missouri would not essentially alter the character or function of the Federal Courts.

The fact that federal decisions hold that there is no Seventh Amendment right to a trial by a jury consisting of twelve persons is irrelevant. Further, the fact that a federal court may have held jury size not to be outcome-determinative has no bearing on the application of the rights guaranteed by the Missouri Constitution and the Supreme Court of Missouri under the *Erie* doctrine. *Colgrove* v. ***Battin,*** *supra,* has no application to the issue presented. As the Tenth Circuit Court of Appeals observed, where jury size

is "bound up" in the rights and obligations of the cause of action, as it is in the state of Missouri, the Federal Court is then obligated by the *Erie* doctrine to follow state court to the fullest extent; *Palmer* v. *Ford Motor Company,* 498 F.2d 952 (10th Cir., 1974). The question presented is simply whether Petitioner will be afforded its substantive right to trial before a twelve-person jury as required by Article I, Section 22(a), Constitution of the State of Missouri, 1945, and *Erie Railroad Company* v. *Tompkins, supra.*

CONCLUSION

Petitioner respectfully submits that the Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on January 9, 1976, on the sole basis that the Court of Appeals has decided an important state question in a way in conflict with applicable state law.

Respectfully submitted,

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